Supreme Court, U.S.
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No. 03-229

IN THE

Supreme Court of the United States

OTIS ELEVATOR COMPANY,

Petitioner,

v.

YASHARAY MACK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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The sole question presented by the Petition is whether the Second Circuit erred when it found that an employee paid on an hourly basis, and who controlled the terms and conditions of Respondent's workplace, could be considered Respondent's supervisor.

Neither the Second Circuit's actual ruling, nor the record below, raised the question presented by the Petition. The ruling is not in conflict with either Congress's intent, nor the court's rulings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), or *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The Second Circuit's ruling is proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

THE PARTIES

Petitioner, Otis Elevator Company ("Otis"), employed the Plaintiff-Respondent Yasharay Mack ("Mack") and her alleged harasser, James Connolly ("Connolly"). Connolly was employed as the "Mechanic-in-Charge" at the worksite where Mack was employed. Mack's title was that of a "Mechanic's Helper." This is an apprentice position that answers directly to the "Mechanic" to which she was assigned. It is undisputed that the "Mechanics" were responsible for training Mack in elevator repair and maintenance. Connolly was the "Mechanic-in-Charge" who was responsible for ensuring that work on the site was completed and distributed in an appropriate manner, and he was responsible for completing all the work the "Mechanics" completed, which included training Mack. Additionally, Connolly was responsible for making overtime assignments. In essence, Connolly was exactly what his title connotes. He was *in charge* of the "Mechanics" Mack reported to, and he was in charge of Mack herself.

Whereas Petitioner has stated that Connolly could take no tangible employment actions against Mack, that is disputed as Mack alleged that Connelly controlled the terms and conditions of her employment in that she was denied overtime

opportunities, denied training, and given demeaning work assignments such as running personal errands by Mr. Connolly.

NEITHER THE RECORD NOR THE DECISION BELOW RAISES THE QUESTION PRESENTED BY THE PETITION

The case below as it relates to Petitioner's claim involves one question. Did the Petitioner's employee have, and exercise, substantial responsibility over the Respondent? When broken down to its essence the true question becomes did the Petitioner's employee control the terms and conditions of Respondent's employment to the extent that he could utilize his position as an employee of Petitioner to harass the Respondent? The Second Circuit answered this question in the affirmative, holding that Petitioner's failure to have an onsite supervisor coupled with the actual authority as well as the perceived authority vested in Petitioner's employee was substantial enough to warrant Petitioner's employee to be considered a supervisor under *Faragher* and *Ellerth*.

The question presented by Petitioner focuses not on actual or apparent authority nor even the actual responsibilities held by Petitioner's employee. Petitioner's question focuses on the method in which Petitioner's employee was paid, in that they only refer to him as an hourly worker. Petitioner made this argument to the Second Circuit to no avail as the Second Circuit's decision clearly determined that the method of payment is not an appropriate yardstick to determine supervisor status.

REASON FOR DENYING THE PETITION

A. The Second Circuit's Decision Below Comports With The Congressional Intent Of The Law As Well As The Decisions Rendered By This Honorable Court.

The Second Circuit's decision below clearly comports with the congressional intent of the law as well as the decisions rendered by this Honorable Court. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, ("Title VII") does not define the term "supervisor." The two (2)

Supreme Court cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, and *Faragher v. City of Boca Raton*, 524 U.S. 775, define the term only as someone with "immediate or successively higher authority over the employee."

The Second Circuit's ruling, determining supervisor status, based their decision not upon whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates, but rather focused on whether the authority given by the employer to the employee enabled or materially augmented the ability of the supervisor or employee to create a hostile work environment for his or her subordinates.

The Second Circuit's ruling is more current than the various interpretations of the Seventh Circuit's decision in *Parkins v. Civil Constructors, Inc.* 163 F.3d 1027 (7th Cir. 1998). The Seventh Circuit in *Parkins* presupposes that supervisors are empowered by their companies to make decisions with regard to hiring and firing. As the facts in the instant matter came to light, Petitioner appeared to attempt to insulate themselves from all claims under Title VII simply by removing any employee with the ability to hire and fire from the direct workforce. In the instant case, the only individual employed by Petitioner who claimed to have the ability to hire or fire the Respondent was a Director of Human Resources who was far removed from the actual worksite.

The Second Circuit's determination was far more practical. The determination focused on whether the relationship to the victim of the alleged harasser was such that it constituted a continuing threat to the victim's continued employment or whether it contributed to conditions that made the Respondent vulnerable to and defenseless against the harasser's particular conduct in ways that comparable conduct by a mere coworker would not.

In the instant action, Respondent was subject to the whim of the "Mechanic in Charge." Essentially, he directed Mack to tighten what bolts and grease what fittings he specified. He also had the power of the purse strings over the Respondent in that he would hand out assignments, which may or may not lead to overtime opportunities and he was specifically responsible for

handing out certain overtime assignments. When these duties are coupled which his obligation to lead and train the workforce, the conclusion that he was a Supervisor is demanded.

The decision below correctly determines the liability for sexual harassment by a co-employee who controls the terms and conditions of another's employment. The Second Circuit appropriately determined that Connolly exercised control over the terms and conditions of Mack's employment. In arriving at that decision, the Second Circuit observed that Connolly directed the workforce and substantially controlled every decision made by Mack in her capacity as an elevator "Mechanic's Helper." Even Mack's title connotes that it was her job to help the "Mechanics." Connolly was a step above the "Mechanics" as he was the "Mechanic in Charge."

B. The Second Circuit's Decision Is In Accord With The EEOC's Enforcement Guidlines.

The Second Circuit's decision is in accord with the EEOC's Enforcement Guidelines, which state as follows:

> An individual qualifies as an employee's supervisor if: (a) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or (b) the individual has authority to direct the employee's daily work activities. EEOC: Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 Fair Empl. Prac. Manual (BNA) 405: 7651, 7654 (2003)

This standard as applied by the Second Circuit is the appropriate determiner for concluding that Connolly was Mack's supervisor in that he had the authority to direct Mack's daily work activities. Additionally, although Petitioner disputes it, he did have the authority to undertake tangible employment decisions affecting her employment. He testified that he distributed overtime and it is quoted as a footnote in Petitioner's brief that if an employee did not listen or was having problems that it was his responsibility to complain about it.

C. The Second Circuit's Decision Does Not Create A Conflict Among The Circuits On An Important And Recurring Question Of Federal Law.

Petitioner misinterprets the decision on *Parkins* when it argues that the Seventh Circuit has interpreted a supervisor to be an employee with ability to hire and fire. The Seventh Circuit defined a supervisor in *Parkins* as follows:

> Hence, it is manifest that the essence of supervisory status is *the authority to affect the terms and conditions of the victim's employment.* This authority *primarily* consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.

(emphasis added).

Parkins does not hold that a "supervisor" must have the ability to hire or fire as is argued by the Petitioner. *Parkins* holds exactly as the Second Circuit's decision that "the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment." The Second Circuit found that Connolly had the ability to affect the terms and conditions of Mack's employment.

CONCLUSION

This case raises no far reaching issues beyond the single case sensitive facts of this particular situation. If Petitioner's argument is taken as correct then they would have this Court allow every employer the ability to insulate themselves from claims under Title VII simply by removing the ability to hire and fire from all but those employees who have anything but sterile supervised contact with employees. That is what Petitioner attempted to do herein. If their argument is believed then no one at the job site controlled the terms and conditions of Ms. Mack's job. This position defies logic.

For all the foregoing reasons, Respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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